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NO.

In The Supreme Court of the United States

OCTOBER TERM, 1983

Alean Hester Faust, Administratrix of the Estate of Charles
Lonnie Faust, Deceased; Tommy Bennett, and Curtis Muldrow,
Petitioners,

vs.

South Carolina State Highway Department, and the United
States of America,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT SOUTH CAROLINA STATE HIGHWAY DEPARTMENT IN OPPOSITION

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ATTORNEYS FOR
RESPONDENT

QUESTION PRESENTED

Did the Court of Appeals correctly follow the decisions of this Court by concluding, as have all Circuits which have addressed this question, that the State of South Carolina did not waive its Eleventh Amendment immunity by maintaining, as part of its highway system, a ferry across the Atlantic Intracoastal Waterway?

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OPINIONS BELOW

The Respondent, South Carolina State Highway Department, respectively requests that this Court deny the Petition for Certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 721 F.2d 932, *rev'd*. 527 F.Supp 1021.

CONSTITUTIONAL PROVISIONS INVOLVED

Eleventh Amendment, U.S. Constitution

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

NO.

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STATEMENT OF THE CASE

This is an action for damages against the South Carolina State Highway Department and the United States arising out of the death of Petitioner Faust's decedent and injuries to the two other Petitioners. The injuries resulted from the collision of the small pleasure boat in which the injured parties were riding with a guide cable which was used at the time to pull a ferry operated by the South Carolina Highway Department across the Atlantic Intracoastal Waterway. The ferry was operated as a continuation of a state highway. S.C. Code Ann. Sec. 57-15-140 (1976).

The Respondent South Carolina State Highway Department moved to dismiss the action based upon the Eleventh Amendment. The District Court denied the motion, but the Court of Appeals

reversed that decision, concluding that the state was immune under the Eleventh Amendment and had engaged in no activity which constituted a waiver of that immunity.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

There is no conflict with the decisions of this Court.

In its decision, the Court of Appeals applied the leading cases of this Court respecting a state's waiver of Eleventh Amendment immunity through its participation in federally-regulated activity. In so doing, the lower court applied those cases in the same manner as all other circuits which have been presented with this question.

This Court's cases hold that a state may waive its Eleventh Amendment immunity by entering an area which Congress had undertaken to regulate, *Parden v. Terminal Railway*, 377 U.S. 184 (1964), but that a state's Constitutional immunity under the amendment can only be abrogated by a Congressional enactment which contains an express waiver provision, *Edelman v. Jordan*, 415 U.S. 651 (1974), or where an analysis of the statute and its legislative history makes it manifest that Congress clearly and unmistakably intended an Eleventh Amendment waiver. *Employees v. Dept. of Public Health and Welfare*, 411 U.S. 279, 285-87 (1973).

The Petitioners incorrectly maintain that Eleventh Amendment waiver should be implied when a state engages in activity in an area subject to federal regulation. (Pet., p. 51). However, it is firmly established that mere entry by a state into an area of federal domain, standing by itself, has no effect on a state's Constitutional immunity. E.g., *Employees, supra*. Petitioners fail to recognize the requirement established in *Employees, supra*, but absent here, that Congressional intent to create a private right of action against the state must be found. See, *Intracoastal Transp., Inc. v. Decatur County Georgia*, 482 F.2d 361 (5th Cir. 1973); *Riggle v. California*, 577 F.2d 579 (9th Cir. 1978).

In this case, the state has done nothing more than maintain a ferry across the Atlantic Intracoastal Waterway as part of its state highway

system.¹ The essence of Petitioners' claim is that this constituted an obstruction to navigation giving rise to a private cause of action. However, this Court has recently reaffirmed its long-held rule that there is "no federal common law 'which prohibits obstructions and nuisances in navigable waters.'" *California v. Sierra Club*, 451 U.S. 287, 295 (1981); quoting *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 (1888). Likewise, this Court concluded that the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. Sec. 401, *et seq.*, did not create a private right of action arising as a result of an obstruction of navigation. *Id.*

Faced with a solid array of adverse precedent in this Court's prior holdings interpreting the Eleventh Amendment, the Petitioners then confusingly maintain that the federal courts can, by devising a federal common law remedy, effect a waiver of the state's Eleventh Amendment immunity. This contention is based upon a strained interpretation of *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). *Moragne*, a case which involved only private parties and where the court's jurisdiction was clear, simply held that maritime law affords a cause of action for wrongful death caused by unseaworthiness. It did not address immunity of a state, and Petitioners can point to no case which so extends *Moragne*. On the contrary, the federal common law power upon which *Moragne* was predicated does not and cannot operate to create jurisdiction in admiralty where it is prohibited by the Eleventh Amendment and where both the state and Congress have declined to subject the state to suit. Cf., *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 95-97 (1981); *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630 (1981). Thus, while Petitioners' argument is imaginative, it is unsound. Indeed, to reach the result contended for by Petitioners in this case would require this Court to abandon the large body of well-established Eleventh Amendment precedent which it has developed.

The decision of the court below is therefore squarely in accord with prior decisions of this Court involving waiver of Eleventh Amendment immunity.

¹Sec. 57-15-140, S.C. Code Ann. (1976), provides that the ferry in question "[f]orms a part of State Highway No. 716, . . ."

II.

There is no conflict among the circuits.

There can be no argument that the result in this case creates conflicts among the circuits, and the Petitioners have cited no court of appeals decision with which the lower court's Eleventh Amendment holding conflicts. Indeed, the only conflict which had existed prior to this case was in the Fourth Circuit itself. *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F.2d 1001 (4th Cir. 1968). The courts of the Second, Third, Fifth, Seventh, and Ninth Circuits (the only other ones which have considered the question) have all either expressly or impliedly declined to follow the Fourth Circuit's *Lauritzen* decision. See, *Red Star Towing and Transportation Co. v. Connecticut*, 431 F. Supp. 1003 (D.Conn. 1976), *aff'd* 556 F.2d 559 (2nd Cir. 1977); *Red Star Towing and Transportation Co. v. Dept. of Transportation of New Jersey*, 423 F.2d 104 (3rd Cir. 1970); *Intracoastal Transportation, Inc. v. Decatur County Georgia*, 482 F.2d 361 (5th Cir. 1973); *Williamson Towing Co., Inc. v. Illinois*, 534 F.2d 758 (7th Cir. 1976); *Riggle v. California*, 577 F.2d 57 (9th Cir. 1978). As the Court of Appeals for the Fourth Circuit recognized, 721 F.2d at 941, (Pet., p. B-31), its conclusion in the present case brought the Fourth Circuit into accord with every other court of appeals which has considered this issue.

CONCLUSION

For the foregoing reasons it is manifest:

1. That the decision of the court below is not in conflict with any prior decisions of this Court, but rather is fully in accord with those decisions;
2. That the decision below did not create, but rather resolved, a conflict in the circuits with regard to implied waiver of a state's Eleventh Amendment immunity.

For these reasons the Respondent submits that here is no basis for granting the Petition for Certiorari in this case, and accordingly the petition should be denied.

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